No. 12,262

IN THE

United States Court of Appeals

For the Ninth Circuit

CLAUDE T. LINDSAY and MARTEL WILSON,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' OPENING BRIEF.

J. EDWARD JOHNSON,
W. G. HARMON,
WILLIAM H. HENDERSON,
Central Tower, San Francisco 3, California
Attorneys for Appellants.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

Cases

Statutes

No. 12,262

IN THE

United States Court of Appeals

For the Ninth Circuit

CLAUDE T. LINDSAY and MARTEL WILSON,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' OPENING BRIEF.

To the Honorable William Denman, Chief Judge, and to the Honorable Associate Judges of the United States Court of Appeals for the Ninth Circuit:

STATEMENT OF PLEADINGS AND FACTS DISCLOSING BASIS OF JURISDICTION OF THE DISTRICT COURT AND THE UNITED STATES COURT OF APPEALS.

The action was commenced in the United States District Court under authority of Act of March 3, 1875, chapter 359, and Amendments thereto (28 U. S. C. Sec. 41, Subd. 20) to recover a claim for damages against the United States of America. This act provides for jurisdiction in the United States District Court in amounts up to $10,000 when founded upon a contract with the Government of the United States of America.

The action herein is founded upon a written contract with the United States entered into June 15, 1942. (Paragraphs II and III of Complaint, R. 2-4.) A breach of this contract is alleged and it is alleged that by reason of said breach plaintiffs were damaged in the amount of $6,833.61 and plaintiffs prayed for judgment against the defendant for this sum. (Paragraphs III, IV and VII of Complaint and prayer of the Complaint, R. 3-4, and 6.)

The basis of the jurisdiction of the United States Court of Appeals is found in Act of March 3, 1891, c. 517, 26 Stat. 826. (See 28 U. S. C. A. Sec. 212, et seq.; 28 U. S. C. A. Sec. 225(a).)

STATEMENT OF THE CASE.

Plaintiffs brought action against the defendant for a breach of contract entered into between plaintiffs and defendant. Copy of the contract and the specifications which are made a part of the contract were admitted and are in evidence as Plaintiffs' Exhibits Nos. 1 and 2, respectively. (R. 29.) Under the contract plaintiffs undertook to construct a certain defense housing project at Benicia, California. The contract provided that defendant would furnish for installation certain fixtures to be installed by the plaintiffs, including space heaters, domestic water heaters, ranges, refrigerators, bathroom fixtures, etc. (See Findings II and III, R. 12 and 13.) The contract further provided that the plaintiffs should prepare the list of the fixtures required and specify the

date of delivery to the project. The plaintiffs did this, signing requisition orders requesting delivery by the defendant to be by August 1, 1942. (Finding IV, R. 14.)

The contract was breached by defendant in that the defendant failed to deliver the fixtures by August 1, 1942, as requested by plaintiffs, but spread delivery of the fixtures over the period August 12, 1942, to January 22, 1943. (Finding IV, R. 14.) Custom and good plumbing practice in the community where the said project was to be constructed dictated that all such fixtures were to be installed in a single trip to each unit of the project. Defendant was notified that piecemeal installation of the fixtures would result in an increase in cost. Defendant, nevertheless, ordered plaintiffs to install said fixtures piecemeal as they arrived. The plaintiffs did install the fixtures piecemeal as they arrived as directed by defendant, pursuant to the contract which provided in Article 15 that in case of disputes "the contractor shall diligently proceed with the work as directed". (Findings 5 and 6, R. 14 and 15.) Article 15 of the contract also provided for certain decisions by the contracting officer and appeal by the contractor within thirty days to the head of the department with respect to disputes.

The plaintiffs followed the procedure provided for in Article 15 and made formal claim to defendant's contracting officer in the amount of $6,833.61, excess costs. The contracting officer ruled that plaintiffs were entitled to only $2,696.00 of the $6,833.61 asked, which ruling was approved by the head of the department.

Plaintiffs in all respects performed all the acts and conditions of the contract on their part to be performed. (Finding VI, R. 15.)

The court found that Article 15 of the contract sued upon constituted an arbitration agreement between plaintiffs and defendant with respect to plaintiffs' claim; that the method used by the contracting officer in calculating the damage was reasonable, and not arbitrary or capricious; and since there was no such discrepancy or inadequacy between the amount sought and amount allowed as to indicate corruption or partisan bias by the contracting officer the court was not justified in setting aside the award and granting damages in addition to the amount of the award. (Finding VI, R. 15-16.) The trial court, therefore, did not render judgment for the amount of damages which the uncontradicted evidence showed that plaintiffs had suffered by reason of the breach of contract (to-wit, $6,536.27), but only for the amount of the award of the contracting officer ($2,696.00).

One question involved is whether the court correctly held Article 15 of the contract to be an arbitration agreement, and consequently whether its finding that plaintiffs were bound by the contracting officer's decision on damages in the absence of arbitrary, capricious, corrupt action or partisan bias was erroneous.

Another question involved is, assuming that the court erred as above indicated, should not the cause be reversed with directions to enter judgment for

plaintiffs in the amount shown to have been suffered by the undisputed, uncontradicted evidence?

SPECIFICATION OF ERRORS.

Appellants hereby specify the following errors which they rely upon in the appeal herein:

1. The trial court erroneously construed Article 15 of the contract sued upon as an arbitration agreement. In this respect it found that Article 15 constituted an arbitration agreement and that, therefore, since the determination of the amount of damages by the contracting officer was not unreasonable, arbitrary or capricious and showed no discrepancy or inadequacy between the amount sought and the amount allowed as to indicate corruption or partisan bias, the court was not justified in setting aside the award of arbitration. This construction and finding was erroneous and prejudicial inasmuch as the court by reason thereof, declined to go behind the decision of the contracting officer and award plaintiffs the damages which the uncontradicted evidence showed that they had suffered by the defendant's breach of the contract. (See items 1, 2 and 3, Appellants' Statement of the Points on Which They Intend to Rely on Appeal, R. 169, 170.)

2. The court erred in not rendering judgment in favor of plaintiffs against defendant in the amount of $6,536.27. The trial court was not bound by the contracting officer's decision under Article 15 of the con-

tract and therefore should have awarded plaintiffs the amount of damages the uncontradicted evidence shows they suffered by reason of defendant's breach of contract. (See items 4 and 5, Appellants' Statement of the Points on Which They Intend to Rely on Appeal, R. 170.) This court, if it reverses the judgment, should direct entry of judgment in favor of plaintiffs in the amount of $6,536.27.

ARGUMENT.

A. SUMMARY OF ARGUMENT.

In the argument we will discuss separately the points covered by the specification of errors. Under subdivision B of the argument, it will be contended that the trial court's construction of Article 15 of the contract as an arbitration agreement was erroneous. It will be shown that the courts have uniformly held that the provisions of Article 15 do not constitute an arbitration agreement and therefore the court erred in concluding that Article 15 deprived it of power to render judgment for the damages proven. Further, the decisions indicate that a holding that Article 15 was an arbitration agreement would conflict with the provisions of the Tucker Act vesting jurisdiction in the Court of Claims and District Courts to adjudicate claims arising out of express contracts. (28 U.S.C. Section 41, subd. 20.)

Subdivision C of the argument will deal with specification of error number 2, wherein it is claimed that

the court erred in not rendering judgment in the amount of $6,536.27, which the uncontradicted evidence showed plaintiffs suffered by reason of the defendant's breach of contract. Plaintiffs will also submit that upon a reversal, the case should be remanded to the District Court with directions to enter judgment for plaintiffs in such amount, in view of the uncontradicted evidence in the case.

B. THE COURT ERRONEOUSLY CONSTRUED ARTICLE 15 OF THE CONTRACT AS AN ARBITRATION AGREEMENT AND ERRONEOUSLY FOUND THAT SINCE THE DETERMINATION OF THE AMOUNT OF DAMAGES BY THE CONTRACTING OFFICER WAS NOT UNREASONABLE, ARBITRARY OR CAPRICIOUS SHOWING NO DISCREPANCY OR INADEQUACY BETWEEN THE AMOUNT SOUGHT AND THE AMOUNT ALLOWED AS TO INDICATE CORRUPTION OR PARTISAN BIAS, THE COURT WAS NOT JUSTIFIED IN SETTING ASIDE THE AWARD OF ARBITRATION. (Specification of Error No. 1 and items 1, 2, and 3, Appellants' Statement of the Points on Which They Intend to Rely on Appeal.)

Article 15 of the contract between plaintiffs and defendant sued upon provided:

> "Article 15. Disputes.—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed." (Finding VI, R. 15.)

With respect to Article 15, the court found:

> "that said Article 15 of said contract constituted an arbitration agreement between plaintiffs and defendant with respect to the plaintiffs' claim herein. That the method of calculating under Article 15 of the contract used by the contracting officer and head of the department resulting in said increase of $2,696.00 and the determination by each of them was reasonable and was neither arbitrary nor capricious. That there was no such discrepancy or inadequacy between the amount sought and the amount allowed by the contracting officer as to indicate corruption or a partisan bias on the part of said contracting officer or head of the department. That the contracting officer and the head of the department did not act so inequitably so that this court would be justified in setting aside the award and granting damages in addition to the amount of the award." (Finding VI, R. 15, 16.)

Thus the court failed to consider any evidence of the damage in excess of $2,696.00, which plaintiff had suffered and proved by uncontroverted evidence. The flat decision was that Article 15 of the contract sued upon constituted an arbitration agreement. Based on this construction, the court concluded it was not justified in upsetting the award and rendering judgment for the full damage suffered as disclosed by the evidence. The court thus, instead of finding and awarding damages for the defendant's breach of contract, merely found that since the contracting officer's determination was reasonable and not arbitrary or capricious

and did not indicate corruption or partisan bias, his award as an arbitrator must stand.

The contracting officer is not an impartial third party. He is the employee of one party to the contract. Article 15 is not an arbitration clause. It is in the nature of a waiver of certain of the contractor's rights as specified in the article but it is not an agreement to have disputes adjudicated by an impartial third party, which is the essence of an arbitration agreement. All the cases specifically dealing with this provision have recognized this and have without conflict ruled that Article 15 must not be construed as an arbitration agreement.

Pertinent is the case of *United States v. Lundstrom* (C.C.A. 9), 139 Fed. (2d) 792, which specifically ruled on Article 15, which is a standard article in Government contracts. In this case the court specifically held that "disputes concerning questions of fact" are distinguishable from "an issue upon the proper interpretation of a contract", and that the decision of the contracting officer in the latter case is not binding on the courts. In reaching this conclusion the court stated at page 795:

> "But, if this were true, the very untenable and paradoxical situation would be present that the government, one of the parties to the contract, would have the decision as to the meaning and extent of its contract. Provisions such as here under consideration do not relate at all to the interpretation of the contract. Issues so arising are strictly issues of law and are for the courts to determine.

> "Although we do not cite it as controlling authority, we think the correct principle is concisely stated in Rust Eng. Co. v. United States, 86 Ct. Cl. 461. 'It will be seen, therefore, that this item of plaintiff's claim was denied upon the construction of the contract rather than upon the facts. It is clear that the court is not deprived of jurisdiction to consider the claim. Appeals were necessary under the contract only on disputes concerning questions of fact, and there was here no controversy as to the facts.' "

The Court of Claims has also in a number of cases had occasion to construe Article 15. These cases hold without conflict that Article 15 was designed to allow a speedy and final determination of certain facts only and does not purport to constitute an arbitration agreement. *Arthur W. Langevin v. United States* (1943), 100 Ct. Cls. 15 (contracting officer under Article 15 disallowed contractor's claims for damages from delay of 18 days in making an inspection. The Court of Claims held that the inspection and decision could have reasonably been rendered in 3 days and allowed the damages shown to have resulted). The court said at page 37:

> "The whole subject in the minds of the parties was the assessment of liquidated damages for delay; they did not have in mind suits against the Government for damages for delays it had caused. On the question of the assessment of liquidated damages the findings of the contracting officer as to the facts and the extent of delay were made final and conclusive, subject to appeal to the head of the department; but on the question of

whether or not the defendant had caused a delay for which it should be mulcted in damages, they have not agreed that his findings of fact should be final and conclusive.

"There is a sound reason why the parties should have been willing to agree that his findings of fact should be conclusive in one instance and not in the other. In the first it was necessary for the contracting officer to determine only that the contractor should be excused for the delay; in the latter it was necessary for him to determine whether or not the defendant had breached its contract by doing something alleged to have delayed plaintiff. The defendant well might have been willing to submit to the final judgment of the contracting officer and head of the department as to the assessment of liquidated damages in its favor, but would not have been willing to submit to the final judgment of either of them the question of whether or not it should respond in damages.

"Congress has conferred exclusive jurisdiction on this court, and in certain cases on the district courts, to decide claims against the Government. It has consented to be sued only in these forums. Can, then, some agent of the Government other than Congress validly contract that someone other than this court or a district court may finally determine the facts upon which liability of the defendant rests? Ordinarily, when the facts are once found, the case has been nine-tenths decided. Since Congress has vested in this court and in the district courts exclusive jurisdiction of cases against the government, it is not to be presumed that the parties intended that some other tribunal

should make findings of fact that would be binding on us. If they did, their agreement would be in violation of the Act of Congress vesting jurisdiction in this court and the district courts, and therefore void.

"We have consistently held that neither article 9 nor article 15 of the Standard Government Contract gives the contracting officer the power to determine a contractor's claim for damages for delay. See *Phoenix Bridge Co. v. United States,* 85 C. Cls. 603, 629, and *Plato v. United States,* 86 C. Cls. 665, 677. See also *United States v. Rice and Burton,* Receivers, 317 U. S. 61, 67.

"In a suit against the United States for damages for delay, we do not think the contracting officer's findings of fact on the cause or extent of delay are conclusive."

It will be noted in the above case the court pointed out that if Article 15 constituted an arbitration agreement, it would be depriving the Court of Claims and the District Courts of their exclusive jurisdiction to decide matters vested in them by Acts of Congress.

Irwin and Leighton v. United States (1944), 101 Ct. Cls. 455, 475.

"It is true that we are not bound by the findings of the contracting officer in a claim for damages due to delay (*Langevin v. United States,* 100 C. Cls. 15), but there is a strong presumption that the delay was not less than that found. The contracting officer, or his representative, had day to day contact with the work and was in the best position of anyone, except the contractor, to know the extent of the delay. He is supposed to weigh

the facts with an even hand before rendering his decision; but it cannot be overlooked that he is the defendant's selection and its own employee. He is not apt to err on the side of the contractor and against his employer, whose interests he is employed to guard and protect. Unless the clear weight of the evidence shows the delay was less than that found by him, we think the defendant is bound by his finding. His finding in this case is not contrary to the weight of the evidence."

Schmoll v. U. S., 63 F. Supp. 753, 759, 105 C. Cls. 458;

Anthony P. Miller, Inc. v. U. S., 77 F. Supp. 209, 212, 111 C. Cls. 252, 330.

Plaintiffs here followed the procedure outlined in Article 15 with respect to the breach of contract complained of before instituting this action. This was done obviously under decisions of the courts requiring that plaintiffs exhaust their administrative remedies before seeking relief from the courts. The decision of the contracting officer and his superior is relevant to the present action only to the extent of showing that the administrative remedy was first exhausted and to show that the minimum amount of $2696.00 at least was due to plaintiffs in the absence of clear evidence to the contrary. (See *Irwin and Leighton v. United States,* supra.)

We respectfully submit that the trial court erroneously construed Article 15 of the contract. This led to prejudicial error inasmuch as the court failed to find the actual amount as proven by the uncontradicted testimony. This, of course, requires reversal.

However, we will point out *infra* that if the cause is reversed, the case should be reversed with directions to enter judgment for the full amount of damages shown by the uncontradicted evidence to have been suffered by the plaintiffs.

C. THE COURT ERRED IN NOT RENDERING JUDGMENT IN FAVOR OF PLAINTIFFS AGAINST DEFENDANT IN THE AMOUNT OF $6,536.27. (Specification of Errors No. 2—see also items 4 and 5, Appellants' Statement of the Points on Which they Intend to Rely on Appeal.)

The uncontradicted and undisputed evidence shows that plaintiffs suffered damages in the amount of $6,536.27 by reason of defendant's failure to deliver the fixtures when specified by plaintiffs, as provided in the contract, coupled with defendant's insistence and order that when the fixtures did arrive, they be installed piecemeal. These orders plaintiffs were compelled to follow under Article 15 of the contract.

Briefly, the uncontradicted, undisputed evidence on damages was as follows: Custom and good plumbing practice in the community where the project was to be constructed was that all of said fixtures should be installed in a single trip to each unit. The representatives of defendant were notified that piecemeal installation would result in an increase in the cost, but they nevertheless required plaintiffs to install said fixtures piecemeal as they arrived. (Finding V, R. 14; Affidavit of E. H. Frick, Plaintiffs' Exhibit No. 6, introduced by stipulation, R. 32, 33.)

The cost of the installation of the fixtures, had they been installed according to custom and good plumbing practice, would have been a total of $7,105, which sum included prefabrication of the necessary fittings. (Affidavit of E. H. Frick, Plaintiffs' Exhibit No. 6; R. 72, 161-165.)

As a result of the delay in the delivery of the fittings and the insistence of the government that when said fittings did arrive, piecemeal, that they be installed piecemeal as they arrived, the actual cost for the installation, which plaintiffs paid to Frick Plumbing Company was $13,047.27. (Finding V, R. 14; 69, 72, 73, 67, 166, 167.)

The difference between the reasonable cost of installation of the fixtures, had it not been for the defendant's breach ($7,105), and the actual cost paid to Frick Plumbing Company ($13,047.27), was $5942.27. Plaintiffs also incurred a loss of 10% on this $5942.27 in reasonable cost of overhead, to-wit, $594.00. (R. 76-77.) This makes a total damage in the amount of $6,536.27.

The installation was done by subcontract to the E. H. Frick Plumbing Company on a cost plus basis. The charge of the Frick Plumbing Company (to-wit, the sum of $13,047.27) was compiled from its time cards, and its ledger and was confined to direct costs only. (R. 41-45.)

Pending the trial, Mr. Nickel, field manager of the Frick Plumbing Company on the project, again made a summary of costs as reflected by the time cards,

ledger sheets and payrolls of the Frick Plumbing Company. His summary showed $13,114.32, which was slightly more than the charge to plaintiffs ($13,047.27) (R. 134-137, Plaintiffs' Exhibit No. 9).

Pending the trial, all the books and records of the Frick Plumbing Company requested by the Government were made available to it for examination by government agents. They were examined by Mr. Ferguson who compared the time cards with the government's architect's reports to determine whether the two were consistent with each other. Each showed on its face specifically the time spent on installation. Mr. Ferguson testified that they were substantially consistent. Thus the Government's report corroborated the time cards showing the installation work by the plumbers:

> "Q. Mr. Ferguson, while you are on the stand, just one question: Isn't it true that the time cards and ledger sheets were delivered to you and you had the fullest opportunity to check one against the other—against the architect's report?
>
> A. I did.
>
> Q. And you found them in substantial agreement, did you not?
>
> A. They are substantially correct, according to the ledger sheets where he has them itemized as installation." (R. 151.)

Further, witness and employee of the defendant, F. Allen Taylor, computed charge for installation of the fixtures from the records in the sum of $15,000—instead of $13,047.27. (R. 106, last paragraph.)

Thus the evidence for basis of plaintiffs' claim for damages was supported and corroborated by the evidence of the government. The government offered no evidence whatsoever contradicting the actual cost to Lindsay or correctness of Frick's charges.

The evidence proffered by the government only tended to show that the contracting officer's decision was not arbitrary or capricious, and it was admitted on that theory:

> "Mr. Harmon. I think at this time, if Your Honor please, I should make my motion to strike all of the testimony of this witness upon that subject as a conclusion, as pure conclusion of the witness.
>
> The Court. I think not. There is involved writing there. In view of the fairness of this action, and the contracting officer—you challenge his action as being capricious and arbitrary and this is a direct refutation of that. The motion is denied." (R. 103-104.)

Defendant's evidence did not challenge in any respect the *actual* damages shown to be incurred by plaintiffs by the uncontradicted evidence. It did not purport to show the actual *cost* to Frick Plumbing Company. Instead, it purported to show how the government representative arrived at the figure of $2,-696.00 which was offered plaintiffs.

Except for the claim, and affidavits (which fully supported plaintiffs' claim), the only other documents before witness Taylor when he made his estimate was the plumbing subcontractor's payrolls and copies of

daily reports by the architect. He used the payrolls from the period September 24 to November 4 and made a list of the days the architect represented the plumbers were working on the installation. Then by averaging the number of plumbers on the job, he struck an estimate and estimated that the probable expense for installing the fixtures in the period was $3,272. Also, in a third payroll period he estimated that $5,420 went to installation and after deducting amounts for labor, adding compensation, insurance, etc. he arrived at a total figure of $2,694.72. (R. 91 to 103.)

How flexible this witness' calculations could be is disclosed by another calculation of this witness. While admitting that the time cards and ledgers, corroborated by the defendant's architect's report, showed actual charges of $15,000 for installation of fixtures (R. 106), he "calculated" that charges prior to October 20, 1942 should not be included in Frick's charges for installation because no fixtures except oil heaters and water heaters had actually been delivered onto the project. The witness either overlooked or was not familiar with the fact that in any installation job there is involved a great deal of work with the fittings, called prefabrication work, prior to their arrival at the project and actual installation, which the time cards and government architect's report disclosed was done. (R. 152, 153.)

This witness entirely overlooked the fact that the estimate of $35.00 per unit and $105.00 for the com-

munity unit making a total of $7,105 was based on the *entire* cost, *including* prefabrication of the fittings necessary for the installation of the mass purchase items. (R. 161 and 162.) Thus without any basis whatsoever, the government witness eliminated the cost of prefabrication of fittings, which, of course, was a necessary part of the installation costs.

We believe that even if Article 15 of the contract was properly construed as an arbitration agreement, the contracting officer's action was so arbitrary and capricious, that it should not stand. But, as pointed out supra, it is not such an agreement and, therefore, clearly plaintiffs are entitled to an award of damages as shown to be incurred by the uncontradicted, undisputed evidence.

Under this state of the record, we respectfully submit that the cause should not merely be reversed, but that the court should direct that judgment should be rendered in favor of the plaintiffs against defendant in the amount of $6,536.27, in lieu of the judgment entered in the amount of $2,696.00. This is proper in the interests of a speedy disposition of the cause.

Howbert v. Penrose (C.C.A. 10), 38 Fed. (2d) 577, 68 A.L.R. 820;

United States v. Utah-Idaho Sugar (C.C.A. 10), 96 Fed. (2d) 756;

Maryland Casualty Co. v. United States (C.C.A. 4), 108 Fed. (2d) 784, 786;

United States v. Illinois Surety Co. (C.C.A. 7), 226 Fed. 653.

In granting motion to modify judgment and in entering judgment in accordance with the facts found by the trial court in the last-named case above, the court pointed out at page 664 that "This court is vested with power to modify, as well as to affirm or reverse, any judgment of the District Court * * * in a case tried without a jury, where the findings of fact made by the court are undisputed, as well as when they are agreed upon by the parties * * *"

Dated, San Francisco, California,
September 2, 1949.

Respectfully submitted,
J. EDWARD JOHNSON,
W. G. HARMON,
WILLIAM H. HENDERSON,
Attorneys for Appellants.